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June 12, 2001

2001-014-106

General Services Administration
FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

Re: FAR Case 2001-014, Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings - Revocation

Dear Ms. Duarte:

I am writing to support FAR Case 2001-014, the proposed rule which would permanently revoke the Clinton administration's "contractor responsibility/blacklisting" regulation.

The "contractor responsibility" rule imposed by the previous administration was politically motivated and would have caused great harm to the government's procurement system and to contractors doing business with the federal government. There was no justification for including the added categories of covered laws in the responsibility rule, the rule provided little or no guidelines to prevent arbitrary or abusive enforcement, and could not be justified from a cost benefit perspective.

1. No justification

Contracting officers are completely untrained and ill-equipped to exercise such responsibility. Moreover, there has been no showing that alleged violations of such laws impact upon an offeror's ability and capacity to perform specific contracts, and no federal agencies had asked for this change to contracting regulations.

Under the suspended rule, the reasonable person, and even the agencies themselves, are left wondering about the most basic factors to be applied in complying with the proposed regulations: "What is "relevant credible information"? Why should the "greatest weight" be given to adjudicatory decision, orders, or complaints issued by any federal agency, board, or commission," regardless of whether such decisions having any bearing on the offeror's ability and capacity to perform? Why should any weight be given to mere "complaints" issued by federal agencies, which are often prompted by unfounded

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allegations of competitors, labor organizations or the like? How will the due process rights of contractors to confront their accusers be protected before the punishment of "non-responsibility" is levied against them?

Even worse, it is clear that the suspended regulations operated in a manner which directly contradicts, and in effect usurps, Congressional mandates. Particularly in the field of labor law, Congress and the courts have established strict limits on the power of the Executive Branch to refuse to award contracts to private employers based upon their alleged noncompliance with labor laws.

Finally, the suspended regulations violate the Congressional mandate to streamline and reform federal procurement, as expressed in the Federal Acquisition Streamlining Act, P.L. 103-355 (1994), and the Clinger-Cohen Federal Acquisition Reform Act, P.L. 104-106 (1994). The purpose of these laws was to make the government's acquisition of products simpler and easier. The regulations would clearly have had the opposite effect, slowing down even the simplest awards because it will take more time to address responsibility issues and investigate allegations of substantial noncompliance with the myriad listed laws.

In this regard, the blacklisting regulation failed to take into account the explosion in responsibility challenges that will confront contracting officers should the regulations not be revoked, due to the activist agendas of various organizations and special interests.

Unions in particular have developed and broadly promoted the use of so-called "corporate campaigns" which make use of the regulatory apparatus to target even small employers for legal challenges, all with the objective of increasing pressure on such employers either to sign a union agreement or leave the marketplace.

Under the blacklisting regulations, unlike the present limited system by which contracting officers check responsibility issues, information alleging contractor noncompliance with laws will flood contracting officers, and the regulations will require the contracting officers to investigate each allegation (albeit without any expertise or resources for doing so). In any event, the procurement system will be overwhelmed under either the old or new proposal, in direct violation of the Congressional mandate. For this reason as well, the blacklisting regulations are unlawful and must be withdrawn.

For each of these reasons, the revised proposed regulations should not be implemented. They violate numerous federal laws and court decisions, hamper the procurement process, and must be withdrawn.

2. The Suspended Regulations Are Arbitrary and Capricious

Historically, contracting officers making responsibility determinations have focused on whether a contractor has been convicted of crimes that directly reflect on moral turpitude

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or have a direct relationship or effect on contract performance. The blacklisting regulations would depart radically from this policy by incorporating a host of other laws that are not relevant to contract performance. There is no rational basis for this change. According to one agency official, each agency responsible for the various new areas of law would have to establish a system whereby contracting officers "can obtain specific, detailed information on decided cases," including "the agency's position as to whether was 'substantial noncompliance' or a clear violation of law."

Of course, no such system presently exists, nor is there any budgetary authorization for such a cumbersome and expensive system to be established. None of the added laws have historically been shown to affect actual contract performance, which is supposed to be the area of the contracting officer's expertise and the only issue in which the government has any interest. Under such circumstances, the responsibility determinations issued by contracting officers can only have arbitrary and capricious results.

The newly stated bases for finding non-responsibility are also inconsistent with the present regulations describing grounds for debarment. The disruption caused by the blacklisting regulations is further exacerbated by the Certification provision appearing at FAR 52.209-5. To the extent that a contractor is required to certify that it has not been found in violation of any of the laws referenced in the proposed regulations, many contractors will be unable to determine how such a question should be answered, in compliance with 18 U.S.C. 1001. The new regulation contains no explanation of the need for such a certification requirement which, for many contractors, will be almost impossible to fulfill.

Many contractors have dozens of locations within the United States run by different divisions or subsidiaries. Certifying compliance with every law specified by the revised proposal, regardless of substantiality, would require internal tracking, recordkeeping and reporting far beyond current norms. No single official at any but the smallest companies is presently able to keep track of their contractors' compliance with all applicable laws and have no reason to do so. Incorrect submissions will raise the specter of liability under federal law.

3. There was no benefit to counterbalance the costs associated with the regulation.

In promulgating the suspended regulation, the previous administration never formulated a cost/benefit analysis. Indeed, there appear to be no measurable benefits, as the federal agencies agreed that the contractor responsibility regulations in place at the time the regulations were originally proposed were adequate to protect the government's interests. The new contractor responsibility regulations would have been successful in raising the costs of doing business with the government, and raising the costs of procurement for every federal agency, without any corresponding benefit.

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Conclusion

It has been widely reported that the genesis behind the suspended was political in nature. It remains vital, however, that the procurement process be free from politics and that there be no favoritism towards special interests. In particular, the federal government has always maintained a position of absolute neutrality on labor issues in the award of government contracts. The contractor responsibility regulations would have destroyed that neutrality and would turn every procurement into a political football. Future offerors would be subject to potentially disqualifying charges under an inestimable number of laws, having no bearing on their ability to perform, and dependent entirely on the negative agendas of labor unions and competitors.

The FAR Council has the power and the obligation to rise above political considerations in order to protect the procurement process from being undermined. The suspended regulations are blatantly unlawful and will create unnecessary distractions from the government's long term procurement objectives. We strongly support the proposed rule revoking the blacklisting regulation and seeking further study of the significant issues raised therein.

Sincerely,

Craig Smith